Pick-Mt. Laurel Corporation *and* Local 170, Bartenders, Hotel, Motel & Restaurant Employees Union, AFL-CIO. Case 4-CA-8533

November 17, 1981

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On January 12, 1979, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it adopted the Administrative Law Judge's finding that Respondent had violated Section 8(a)(5) and (1) of the Act, for reasons noted below. Upon a petition for review and a cross-application for enforcement of the Board's Order, the United States Court of Appeals for the Third Circuit denied enforcement of the Board's Order and remanded the case to the Board for further consideration consistent with its opinion.[2] The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board upon remand. The General Counsel has filed a statement of position and Respondent has filed a statement of position and a motion to reopen the record.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In order to place the substance of the court's remand in proper perspective, we note the following facts: Respondent's predecessor, the MLH Development Company (MLH), began operation of the hotel and restaurant involved herein on June 5, 1975. In February 1975, months before the facility opened, MLH recognized the Union as the exclusive collective-bargaining representative of a unit of the facility's employees. In April 1975, before any employees were hired, MLH and the Union reached agreement on a collective-bargaining contract. This contract, executed on June 1, 1975, was effective until December 4, 1977. The agreement contained a valid union-security clause. Nevertheless, MLH unlawfully and regularly required new employees to sign union membership applications and dues-checkoff authorization cards at the time they were hired. In February 1977, the facility was acquired by P-B Associates, of which Respondent was the general partner.

On February 9, 1977, Respondent, as successor to MLH, began operating the hotel and restaurant facilities. It retained all of MLH's employees. On February 24, 1977, Respondent withdrew recognition from the Union. The following day, the Union called a strike and Respondent filed a representation petition with the Board. The charge herein was filed on March 4, 1977, alleging Respondent's refusal to bargain with the Union as a violation of Section 8(a)(5) and (1) of the Act.

In the earlier proceeding, the Administrative Law Judge found that Respondent had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, and refusing to bargain with it, on and after February 24, 1977. In so concluding, the Administrative Law Judge found that Respondent was a successor to MLH; that the contract between MLH and the Union established the Union's presumptive majority status; and that Respondent had not shown either that the Union in fact no longer represented a majority of the unit employees or that Respondent had a reasonably grounded doubt based on objective considerations of that majority status. In his decision, the Administrative Law Judge rejected Respondent's contention that its withdrawal of recognition was justified because its predecessor had unlawfully recognized the Union. The Administrative Law Judge found that this unlawful recognition occurred 2 years before the charge herein was filed, was outside the limitations period set forth in Section 10(b) of the Act, and could not be considered in determining the legality of Respondent's withdrawal of recognition. He also rejected Respondent's attempt to rely on the subsequent unlawful acts of MLH in requiring new employees to sign applications for membership and dues-checkoff authorizations on their first day of employment as he found "no showing that specific incidents" of such misconduct had occurred within the 6-month 10(b) period preceding the filing of the unfair labor practice charge in this case.[4]

Upon exception to the Administrative Law Judge's Decision, the Board agreed with the Administrative Law Judge's conclusion that Respondent had unlawfully withdrawn recognition from the Union. With regard to Respondent's reliance on its

[1] 239 NLRB 1257.

[2] *Pick-Mt. Laurel Corporation* v. *N.L.R.B.*, 625 F.2d 476 (3d Cir. 1980).

[3] Respondent submitted a motion to reopen the record so that it might present evidence regarding the appropriateness of issuing a bargaining order at the present time in light of certain alleged changed circumstances at Respondent's facility. In light of our decision herein, we find it unnecessary to reopen the record to take such evidence and Respondent's motion is thus denied.

We also deny Respondent's later filed request for oral argument as the record, briefs, and various submissions are adequate to dispose of the issues presented for consideration.

[4] See 239 NLRB at 1261. Respondent had also offered other evidence clearly occurring in the 10(b) period, which it claimed supported its withdrawal of recognition from the Union. The Administrative Law Judge independently analyzed this evidence and found that it did not establish loss of majority or a reasonably based doubt of that majority.

predecessor's earlier illegal recognition of the Union, the Board added that, as the circumstances surrounding the Union's initial recognition and execution of a contract with the predecessor occurred outside the 10(b) limitations period, they could not constitute an objective basis for a reasonably based doubt of majority status.[5] The Board accordingly adopted the Administrative Law Judge's recommended Order as modified.

On review, the Third Circuit held that the Board had erred in refusing to consider pre-10(b) evidence offered by Respondent concerning its predecessor's relationship with the Union. The court indicated that even if Respondent could not use pre-10(b) evidence to nullify the contract upon which the General Counsel relied to establish the presumption of the Union's majority status, there was no reason why Respondent could not rely on the evidence "surrounding the . . . contract's inception to shed light upon its refusal to bargain as background evidence buttressing Respondent's analysis of the various timely events which allegedly gave rise to its good-faith doubt of majority status."[6]

Also, the court referred to the predecessor's illegal practice of requiring employees to join the Union and to sign dues checkoffs on their first day of work. The court noted Respondent's argument that this practice, constituting an independent unfair labor practice as to each new employee hired including those hired within the 10(b) period, might serve as the "relevant temporal anchor" to which consideration of pre-10(b) events could be tied. However, the court remanded on this issue also since it concluded that neither Respondent's brief to the court nor the Board's decision addressed the relationship between this unlawful assistance during the 10(b) period and Respondent's claim of good-faith doubt.

Lastly, in light of Respondent's desire to use pre-10(b) evidence here to defend against, rather than to establish, an unfair labor practice the court directed the Board to explain, on remand, its reasons for using the date of the filing of the charge (March 4, 1977), as the benchmark for tolling the 10(b) period.

Having accepted the remand, the Board also accepts the court's opinion as the law of the case. Thus, we are compelled to consider evidence of events occurring prior to the advent of the 10(b) limitations period insofar as they shed light on objective considerations supporting Respondent's asserted reasonably based doubt of majority status. In this regard, the fact that the Union was recognized by, and negotiated a collective-bargaining agreement with, Respondent's predecessor without prior choice or designation by any member of the bargaining unit, though occurring outside the 10(b) period, may be used as background evidence lending credence to Respondent's assertion that its own observations within the 10(b) period were sufficient to prompt a reasonably based doubt of the Union's majority status. Such observations included expression of dissatisfaction with the Union made to Respondent's supervisors by at least 29 of the 103 employees employed by Respondent at the time Respondent withdrew recognition, an expression which under terms of the remand we must regard as substantial. Additionally, consistent with the court's direction to the Board, we note that the predecessor's conduct in unlawfully requiring new employees at the time of their hire to execute union membership and dues-checkoff cards also supports Respondent's claim that it doubted that the Union represented an uncoerced majority of its employees when it withdrew recognition and that its doubt was grounded on objective considerations.[7] Thus, pursuant to the remand of the court, we find that Respondent has presented evidence of objective considerations supporting its good-faith doubt of the Union's majority status sufficient to rebut the Union's presumption of majority status. We shall accordingly revoke our prior Decision and Order

[5] See 239 NLRB 1257, at fn. 2.

[6] 104 LRRM at 2708, quoting 436 F.Supp. at 1355.

[7] With regard to this unlawful assistance offered to the Union by Respondent's predecessor, the Administrative Law Judge found that there was no showing that specific incidents of such unlawful assistance had occurred in the 10(b) period; which he deemed to commence on September 4, 1976; i.e., 6 months before the charge was filed on March 4, 1977. He stated that Respondent had only established that, on February 9, 1977, when it took over the facility, 50 of the then 80-employee unit complement had been working less than 6 months, or since August 9, 1976. He then noted that on the refusal to bargain date of February 24, the unit had expanded to 103 employees but that there was no evidence of which or how many of these employees had been hired within the 10(b) period, i.e., since September 4, 1976. He found this a critical point. Viewing this issue within the confines of the court's remand, however, we consider it unimportant that Respondent was unable to state with precision how many employees were hired within the 6-month 10(b) period utilized by the Administrative Law Judge. We note that at fn. 7 of its decision, the court recognized that Respondent had not produced specific evidence of the number of employees who were affected by the unlawful assistance from 6 months before the date Respondent *itself* wished to use as the tolling date for the 10(b) period, i.e., the refusal-to-bargain date. Still, the court questioned whether "evidence of a tainted majority" was necessary when Respondent only wanted to consider this evidence in conjunction with other evidence to establish—not proof of actual loss of majority—but only a reasonably based doubt of majority. In any event, the record contains uncontradicted testimony to the effect that the procedure requiring cards to be signed at the time of employment continued through February 9, 1977, and that there was constant turnover among Respondent's employees. Moreover, the record also contains a stipulation by the parties setting forth when various employees in the housekeeping department were hired which states that one housekeeping employee was hired by Respondent's predecessor on February 2, 1977, and another on February 6, 1977, clearly within the 10(b) period regardless of whether the filing of the charge or the withdrawal of recognition tolled the limitations period. In light of this evidence and our disposition herein, we find it unnecessary to pass on the issue of which date (the date the charge was filed, or the date recognition was withdrawn) should toll the 10(b) period in this case.

in this case and dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that its prior Decision and Order in this case be, and it hereby is, revoked and the complaint herein be, and it hereby is, dismissed in its entirety.